Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **June 8, 2018**

CLAIM NO. 201700659

LONE MOUNTAIN PROCESSING PETITIONER/CROSS-RESPONDENT

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

DONNIE WAYNE CLARK RESPONDENT/CROSS-PETITIONER
And HON R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENT

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Lone Mountain Processing ("Lone Mountain") appeals and Donnie Wayne Clark ("Clark") cross-appeals from

the Opinion, Award and Order[1] rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"), awarding permanent total disability benefits subject to the tier-down provision in the 1994 version of KRS 342.730(4). On appeal, Lone Mountain argues the 1996 version of KRS 342.730(4) should apply to Clark's award. Clark argues the ALJ erred in applying the 1994 version of KRS 342.730(4) to his award. We affirm.

Clark filed his occupational disease claim on April 10, 2017, alleging he became affected by coal workers' pneumoconiosis on May 13, 2016. Because the sole issue on appeal pertains to the applicable version of KRS 342.730(4), we will not summarize the medical and lay evidence.

The ALJ found Clark established complicated coal workers' pneumoconiosis Category 2/3 and concluded he is permanently totally disabled pursuant to KRS 342.732(1)(e). Clark was fifty-one years old on the date of his last exposure. Therefore, the ALJ applied the tier-down provision of the 1994 version of KRS 342.730(4) to Clark's claim.

On appeal, Lone Mountain argues the 1996 version should have been applied to Clark's award because the

[1]The ALJ issued orders on December 14, 2017 and January 19, 2018 amending the Opinion, Award and Order to reflect the decision was rendered on December 8, 2017 as opposed to November 8, 2017, as originally listed in Opinion.

provision on the date of last exposure. By applying the 1994 tier-down provision rather than terminating benefits at age 67, Lone Mountain contends the ALJ arbitrarily and capriciously increased its liability without due process. Clark responds he should receive full lifetime benefits, and the tier-down provision should not be applied to his award pursuant to the holding in Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017). Clark cites the unpublished decision of the Kentucky Supreme Court in Cruse v. Henderson County Board of Education, 2015-SC-000506-WC (Rendered December 14, 2017), for the proposition that KRS 342.730(4) is no longer to be considered in any way.

We have recently explained our belief that the pre-amendment version of KRS 342.730(4) controls. In Pickett v. Ford Motor Co., Claim No. 2015-01910, (WCB February 16, 2018), we explained:

> [T]he Supreme Court's pronouncement in Parker lacks guidance as to how income benefits should now be calculated for injured older workers. In other words, should income benefit calculations for injured older workers be devoid of any age-related restrictions or should income benefit calculations revert back to the previous version of KRS 342.730(4) immediately preceding the 1996 version? Having had another opportunity to offer guidance in Cruse v. Henderson, Not To Be Published, 2015-SC-00506-WC (December 14, 2017), the Supreme Court declined.

Thus, this Board must turn to other sources in order to address this inquiry.

The previous version of KRS 342.730(4) reads as follows:

> If the injury or last exposure occurs prior to the employee's sixty-fifth birthday, any income benefits awarded under KRS 342.750, 342.316, 342.732, or this section shall be reduced by ten percent (10%) beginning at age sixty-five (65) and by ten percent (10%) each year thereafter until and including age seventy (70). Income benefits shall not be reduced beyond the employee's seventieth birthday.

The above-cited language does not induce the same constitutional quandary identified by the Parker Court, as the tier-down directed in the previous version of KRS 342.730(4) does not differentiate between injured older workers eligible for old-age Social Security benefits and those who are not. All workers injured before the age of sixty-five are subject to the tier-down provisions regardless of their eligibility for Social Security benefits. The previous version of KRS 342.730(4) does, however, differentiate between injured younger workers and injured older workers, because those injured above the age of sixty-five are not subjected to the tier-down. The Parker Court has already addressed the rational basis of providing for such a distinction:

> The rational bases for treating younger and older workers differently is: (1) it

> prevents duplication of benefits; and (2) it results in savings for the workers' compensation system. Undoubtedly, both of these are rational bases for treating those who, based on their age, have qualified for normal Social Security retirement benefits differently from those who, based on their age, have yet to do so.
> Id. at 768.

However, there must be a determination of whether the Supreme Court's pronouncement in Parker revives the previous iteration of KRS 342.730(4).

KRS 446.160 states as follows:

> If any provision of the Kentucky Revised Statutes, derived from an act that amended or repealed a pre-existing statute, is held unconstitutional, the general repeal of all former statutes by the act enacting the Kentucky Revised Statutes ***shall not prevent the pre-existing statute from being law if that appears to have been the intent of the General Assembly***.
> (Emphasis added).

In making an educated assessment of the legislative intent at the time the current version of KRS 342.730(4) was enacted in 1996, we turn to a contemporaneous provision, contained in the 1996 legislation, in which the legislature addressed the dire need to preserve the long-term solvency of the Special Fund, now the Division of

Workers' Compensation Funds, which reads as follows:

> **Section 90.** The General Assembly finds and declares that workers who incur injuries covered by KRS Chapter 342 are not assured that prescribed benefits will be promptly delivered, mechanisms designed to establish the long-term solvency of the special fund have failed to reduce its unfunded competitive disadvantage due to the cost of securing worker's vitality of the Commonwealth's economy and the jobs and well-being of its workforce. Whereas it is in the interest of all citizens that the provisions of this Act shall be implemented as soon as possible, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

The language of Section 90 indicates the legislature, at the time the 1996 version of KRS 342.730(4) was enacted, intended to preserve the solvency of the Special Fund. Indeed, the language used in Section 90 speaks to this intent as being "an emergency." This legislative intent cannot be ignored in the wake of the Supreme Court's determination the 1996 version of KRS 342.730(4) is unconstitutional. This expressed concern certainly bolsters the conclusion the legislature contemplated a revival of the tier-down provisions in the previous version of KRS 342.730(4).

> Accordingly, we hold that income benefits are to be calculated pursuant to the tier-down formula as set forth in the pre-existing version of KRS 342.730(4) in place when the statute in question was enacted in 1996. As the record indicates Pickett was sixty at the time of the July 13, 2015, injury to his left shoulder, and the ALJ awarded PPD benefits commencing on July 13, 2015, we vacate the ALJ's award of PPD benefits which are "subject to the limitations set forth in KRS 342.730(4)" and remand for a revised calculation of PPD benefits and an amended award consistent with the views set forth herein.

Clark's reliance on Cruse is misplaced. There, the claimant was seventy-one years old at the time of his injury. The Board previously determined, and the Court of Appeals affirmed in the unpublished decision in Richardson Hardware, Inc. v. Bridges, 1996-CA-1709 (rendered May 39, 1997), that the tier-down provision in the 1994 version of KRS 342.730(4) did not apply when a claimant is over the age of sixty-five at the time of his injury. The Court in Cruse did not hold the prior version of KRS 342.730(4) was inapplicable to all claims. Rather, according to the clear language of the statute, the provision had no application in Cruse's specific claim because he was over the age of sixty-five at the time of his injury.

As such, in Clark's case, KRS 342.730(4) must be applied as it existed prior to the 1996 amendment until such

time as any new amendments of the statute take effect. Because Clark was not sixty-five years old at the time of his injury, his award is subject to the tier-down provision contained in KRS 342.730(4) enacted in 1994.

Accordingly, the Opinion, Award and Order rendered by Hon. R. Roland Case, Administrative Law Judge, is hereby **AFFIRMED.**

ALL CONCUR.

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